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Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

No. 98-97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELOISE ANDERSON, *et al.*,

Petitioners,

vs.

BRENDA ROE and ANNA DOE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC., CENTER FOR CONSTITUTIONAL RIGHTS, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

With the consent of the parties, the Brennan Center for Justice at New York University School of Law; the Asian American Legal Defense and Education Fund, Inc.; the Center for Constitutional Rights; the Lawyers' Committee for Civil Rights of the San Francisco Bay Area; and People for the American Way Foundation submit this brief *amici curiae* in support of Respondents.[1] Letters of consent are on file with this Court.

The Brennan Center for Justice at New York University School of Law is a nonpartisan institute dedicated to a vision of inclusive and effective democracy. The Center unites the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice William Brennan, Jr. To that end, the Center has created a Democracy Program, which undertakes projects that promote equal citizenship and other core ideals of democratic government. The Center takes an interest in this case because California's durational residency requirement for receipt of full welfare benefits reflects a failure of the democratic process in that it treats newcomers as second-class citizens by denying them privileges afforded to long-term state residents.

The Asian American Legal Defense and Education Fund, Inc. ("AALDEF") is a national nonprofit organization providing legal assistance and education to the Asian Pacific American community. Since its founding in 1974, AALDEF has counseled thousands of women and their families in regard to their legal rights to social service benefits, including welfare, as well as their rights to protection against domestic violence. The imposition of restrictions on the right to interstate travel on welfare recipients is of great concern to the Asian American community and AALDEF. As immigrants to this country, Asian Americans have faced countless legal barriers as well as exclusion; they hold dear the right to travel including the right to

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1. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici*, has contributed monetarily to the preparation and submission of this brief.

migrate from one part of the country to another. Restrictions on residency of the type imposed by California are similar to past restrictions on Asian immigrants and equally odious.

The Center for Constitutional Rights is a progressive law, education, and advocacy organization that is dedicated to the advancement of the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. The Center, which grew out of the civil rights movement in the Deep South in the 1960s, has long been in the forefront of social and economic justice litigation. The Center takes an interest in this case because durational residency requirements for welfare recipients deny economic justice to indigent citizens.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("Lawyers' Committee") is a civil rights and legal services organization devoted to advancing the rights of people of color, low-income individuals, immigrants and refugees, and other under-represented persons. The Lawyers' Committee is affiliated with the Lawyers' Committee for Civil Rights Under Law in Washington D.C., which was created at the behest of President Kennedy in 1963. In 1968, the Lawyers' Committee was established by leading members of the private bar in San Francisco. Given its focus on poverty and immigration issues, the Lawyers' Committee is particularly concerned with the treatment of "outsiders." Whether newcomers to this country or poor people seeking a firmer foothold in society, these new residents of a state have not been represented in the political process and therefore are entitled to heightened judicial solicitude in the face of any burden imposed on their "outsider" status.

People for the American Way Foundation ("People For") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights and fair treatment, issues which are directly involved in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The statute at issue in this case, section 11450.03 of the California Welfare and Institutions Code,[2] is the product of a structurally flawed democratic process and thus invites close scrutiny from this Court. The law institutes a one-year residency requirement for receipt of full welfare benefits – discriminating against a class of residents, including respondents, who had no representation in the law-making process. Respondents were excluded from that process both legally, because they could not vote in California when the law was passed, and practically, because they are welfare recipients, a historically disempowered group.[3] The Constitution does not permit such invidious discrimination against those excluded from democratic decision-making.

There is a close relationship between the intensity of judicial review and perceived structural weaknesses in the democratic process. *See generally* John Hart Ely, *Democracy and Distrust* 105-80 (1980). In settings where the democratic process adequately considers and weighs conflicting interests, this Court applies minimal "rational basis" scrutiny to the actions of the political branches. *See, e.g., FEC v. Beach Communications, Inc.*, 508 U.S. 307, 320 (1993) (applying

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2. Cal. Welf. & Inst. Code § 11450.03(a) (1997) provides, in relevant part, that

> families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with [California's benefit schedule], not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

3. The statute was enacted in 1992 and enjoined in 1993. *See Green v. Anderson*, 811 F. Supp. 516, 517, 523 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe*, 513 U.S. 557 (1995) (per curiam). Following enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601, *et seq.* (1998), with its purported authorization of one-year durational residency requirements for full benefits, California once again sought to enforce section 11450.03. *See Roe v. Anderson*, 966 F. Supp. 977, 979-80 (E.D. Cal. 1997) (discussing history of state and federal statutes), *aff'd*, 134 F.3d 1400 (9th Cir. 1998).

rational basis scrutiny to federal statute regulating cable television); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58, 461-62 (1988) (applying rational basis scrutiny to school bus fee ordinance that affected neither a fundamental interest nor a suspect class); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-9 (1974) (applying rational basis scrutiny to zoning ordinance); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1973) (applying rational basis scrutiny to state tax law). Where, however, the targets of adverse legislative action lack the power to defend their interests effectively in the political arena, this Court will subject the actions of the political branches to greater scrutiny to assure that the majority does not unfairly burden the constitutional rights of the politically powerless. *See Bolling v. Sharpe*, 347 U.S. 498, 499 (1954); *cf. United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) (considering whether "legislation which restricts" the democratic process or burdens "discrete and insular minorities" requires "searching judicial scrutiny").

Often, the inability of a person or group to secure adequate consideration in the political process stems from historic bias or prejudice against a "discrete and insular" political, religious, racial, or sexual minority residing in the midst of the political majority. *Carolene Prod.*, 304 U.S. at 152 n.4; *see, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135-36 (1994) (gender); *Lalli v. Lalli*, 439 U.S. 259, 265-66 (1978) (illegitimacy); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (alienage); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (race); *Oyama v. California*, 332 U.S. 633, 646-47 (1948) (ancestry). Other times, however, the targets of potentially unfair legislative action physically reside outside the relevant political community, with no power at all to secure adequate consideration of their interests.

Not surprisingly, this Court has consistently recognized that legislative action designed to burden such political "outsiders" by treating them worse than political "insiders" must satisfy heightened judicial scrutiny. As *Amici* demonstrate in Point I, this Court's dormant Commerce Clause jurisprudence provides consistent authority for invalidating state legislation that imposes a special or distinct

disadvantage on out-of-state interests.[4] *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *Raymond Motor Transp. Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-68 & n.2 (1945). This Court has rejected deferential review when considering such protectionist legislation because state lawmakers have no incentive to deal evenhandedly with citizens outside their constituency. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994); *South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984); *South Carolina State Highway Dep't v. Barnwell Bros. Inc.*, 303 U.S. 177, 184-86 & n.2 (1938).

The Court has also applied heightened scrutiny under the Equal Protection Clause when reviewing state legislation affecting new residents — especially in right-to-travel cases. *See* Point II. In a wide range of contexts — from government benefits and voting to health care, veterans benefits, and education — this Court has refused to permit longtime residents to treat newcomers, especially poor newcomers, as second-class citizens. The Court's willingness to apply heightened scrutiny — sometimes full-fledged strict scrutiny and other times a skepticism akin to "rational basis with a bite"[5] — suggests that judicial intervention is proper when new residents have been excluded from the political process.

In each of the last three generations, entrenched political majorities have sought to prevent poor newcomers from migrating to their states by forcing the newcomers to live under harsh,

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4. The Commerce Clause assigns to Congress the power "[t]o regulate Commerce ... among the several States." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause in its "dormant" or "negative" state provides the authority for the Court's long line of decisions reviewing state regulations of interstate commerce. *See, e.g., New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) (citing dormant Commerce Clause cases).

5. David A. Donahue, Note, *Penalizing the Poor: Durational Residency Requirements for Welfare Benefits*, 72 St. John's L. Rev. 451, 464 (1998); *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 459 n.4 (1985) (Marshall, J., concurring in part and dissenting in part) (describing Court's application of heightened scrutiny in right-to-travel cases under guise of rational basis review).

discriminatory rules that do not apply to long-time residents. In the 1930s, states threatened those who aided poor newcomers with incarceration. *See Edwards v. California*, 314 U.S. 160, 171, 177 (1941) (striking California law that made it a misdemeanor to bring into the state an indigent person). Later, states threatened newcomers with starvation by denying them subsistence benefits. *See Shapiro v. Thompson*, 394 U.S. 618, 621-26 (1969) (striking state laws that required one year of residency before new residents would become eligible for welfare benefits). Now California is threatening poor newcomers with the prospect of inadequate benefits — benefits so low that even the State concedes they will cause significant hardship. *See Roe v. Anderson*, 966 F. Supp. 977, 982-83 (E.D. Cal. 1997) (noting that California does "not disagree with plaintiffs' contention that there will be disparities, even significant disparities, . . . between newcomers and recipients who have resided in the state for one year"), *aff'd*, 134 F.3d 1400 (9th Cir. 1998).

In *Edwards* and *Shapiro*, this Court rebuffed state efforts to deter the migration of newcomers by treating them as second-class citizens. No basis exists to hold that hunger or homelessness are more constitutionally palatable deterrents to poor newcomers than the threats of prison and starvation invalidated in *Edwards* and *Shapiro*. The laws singling out these politically and economically disadvantaged outsiders should be subject to strict judicial review, but under any standard, these laws cannot withstand constitutional scrutiny.

Finally, Congress's effort to authorize states to treat newcomers as second-class citizens cannot save California's effort to deter the migration of poor persons into the State. *See* Point III. Congress simply cannot authorize states to violate the Equal Protection Clause. *See Shapiro*, 394 U.S. at 641.

ARGUMENT

I.

THE COURT'S DORMANT COMMERCE CLAUSE JURISPRUDENCE DEMONSTRATES THAT HEIGHTENED SCRUTINY IS REQUIRED WHEN STATES DISCRIMINATE AGAINST OUTSIDERS.

The Court's dormant Commerce Clause jurisprudence has long reflected the Court's unwillingness to defer to the legislative process when lawmakers disproportionately burden those who are not politically represented (out-of-staters) and are powerless to hold political leaders accountable. Although *amici* do not argue that the Court's Commerce Clause jurisprudence controls consideration of this case, that tradition, including the ground-breaking Commerce Clause case of *Edwards v. California*, 314 U.S. 160 (1941), provides support for applying heightened scrutiny in this case.

Since the 1930s, heightened judicial scrutiny under the Commerce Clause has checked an undemocratic tendency in our federal system to burden those not represented in local political processes. Chief Justice Stone introduced this theory of the Commerce Clause and its process-based approach to judicial review, stating:

> [T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.

Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 767 n.2 (1945); *see also South Carolina State Highway Dep't v. Barnwell Bros. Inc.*, 303 U.S. 177, 184 n.2 (1938).

The Court's decision in *Barnwell Bros.* also illustrates its early reliance on the nature of the democratic process as a rationale for its decision-making in Commerce Clause cases. In *Barnwell Bros.*, the Court upheld a South Carolina regulation that banned trucks wider than 90 inches or heavier than 20,000 pounds from State highways, even though the regulation significantly burdened interstate

commerce. *See* 303 U.S. at 180, 187. The Court found that the regulations also had a significant adverse effect on shippers within the State, and thus that South Carolina's political processes could be relied upon to "safeguard against [the regulations'] abuse." *Id.* at 187.

In its "modern" Commerce Clause cases, the Court has continued to turn to the process-based rationale to support its searching review of state legislation that may interfere with interstate commerce.[6] In those cases, the Court has refused to presume that the political process will function as a check on legislatures that have burdened out-of-state businesses or interests. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-66 (1981) ("Less deference to the legislative judgment is due, however, where the local regulation bears disproportionately on out-of-state residents and businesses."); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978). In *Raymond Motor*, for instance, the Court struck down a Wisconsin law restricting the operation of trucks longer than 55 feet because an array of protectionist exemptions "undermine[d] the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce." 434 U.S. at 447. Before striking the law, the Court discussed its history of deference to state regulation in the field of "highway safety," *id.* at 443, stating:

> [S]pecial deference to state highway regulations derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus

6. State laws that are facially neutral but burden interstate commerce are reviewed under a balancing test which asks: (1) whether the regulation is rationally related to a legitimate state end and, if so, (2) whether the regulatory burden imposed on interstate commerce is outweighed by the state interest in enforcing the regulation. *See, e.g., Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 186-87 (1950); *Southern Pac.*, 325 U.S. at 770-71. Laws that explicitly discriminate against interstate commerce — "protectionis[t]" regulations — are subject to a "virtually per se rule of invalidity." *City of Philadelphia. v. New Jersey*, 437 U.S. 617, 624 (1978); *cf. Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (applying the "strictest scrutiny" to protectionist legislation).

> insuring that a State's own political processes will serve as a check against unduly burdensome regulations.

Id. at 444 n.18; *see also Maine v. Taylor*, 477 U.S. 131, 139 (1986) ("[A]ny relaxation in the restrictions on state power otherwise imposed by the Commerce Clause unacceptably increases 'the risk that unrepresented interests will be adversely affected by restraints on commerce.' ") (quoting *South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984)); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350-53 (1977).

In *Edwards v. California*, the Court explicitly relied on the Commerce Clause to invalidate a California law that made it a crime to transport a destitute person into the jurisdiction. *See* 314 U.S. at 172-73. Although the *Edwards* Court based its decision on a principle of federalism – that the Commerce Clause proscribes any state's attempt to isolate itself from national problems by restraining the movement of poor people into the state – the opinion also finds support in the democratic failure theory. The Court applied heightened scrutiny to the California statute in part because the individuals burdened by the law were excluded from the political process, stating that "the indigent non-residents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the [state] legislature in order to obtain a change in policy." *Id.* at 174 (citing *Barnwell Bros.*, 303 U.S. at 185 n.2).

The Court's willingness to intervene in Commerce Clause matters, based on a theory of democratic failure, provides substantial support for the Court's intervention here, where California has once again attempted to penalize the poor for coming to the State.[7] The individuals affected by section 11450.03 were excluded from the political process because, like the out-of-state truckers in *Raymond Motor*, they were not residents of the State when the law was enacted. In addition, respondents' poverty makes it unlikely that any insiders will fairly represent their interests. This kind of double exclusion

7. For a compelling analysis of how the Commerce Clause would apply to durational residency requirements, *see* Stephen Loffredo, *"If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residence Restrictions on Welfare*, 11 Yale L. & Pol'y Rev. 147 (1993).

warrants application of the theory of judicial review developed in the Commerce Clause cases, under which the Court should strike down the California statute.[8]

II.

THE COURT'S PROTECTION OF NEWCOMERS UNDER THE EQUAL PROTECTION CLAUSE AND THE RIGHT TO TRAVEL DEMONSTRATES THAT STRICT SCRUTINY IS REQUIRED HERE.

The Court's review of state legislation affecting new residents (as opposed to the non-residents burdened in the Commerce Clause cases) also reflects its fundamental concern for those who are outside the political system. In a wide variety of contexts, including

- government benefits,
- voting,
- health care,
- veterans benefits, and
- education

the Court has interpreted the Equal Protection Clause and the right to travel to preclude state laws that make access to a benefit or service contingent on length of residency. And, as *amici* demonstrate below in their survey of the Court's decisions in this area, the Court's

8. *Amici* do not rely on the dormant Commerce Clause as direct authority for striking section 11450.03. However, *amici* do suggest that the Court's dormant Commerce Clause jurisprudence is illustrative of the Court's general skepticism toward laws burdening outsider interests. Without question, Congress may authorize state regulations that would violate the dormant Commerce Clause in the absence of such authorization. *See Maine v. Taylor*, 477 U.S. at 138-39. However, Congress may not authorize state regulations that violate the Equal Protection Clause, and it is, at a minimum, the Equal Protection Clause that would be violated by California's enforcement of section 11450.03. *See Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); Point III *infra*.

application of heightened scrutiny to laws that burden newcomers reflects an underlying suspicion of legislation that selects outsiders, such as the poor newcomers here, for discriminatory treatment.

A. Government Benefits

The Court's decisions on the distribution of government benefits to newcomers indicate an awareness, explicit in the Commerce Clause cases, that heightened judicial review is necessary when the legislative branch adopts laws that disproportionately burden those outside the system. Beginning with *Shapiro v. Thompson*, 394 U.S. 618 (1969), those cases recognize that democratic institutions often neglect the rights and interests of outsiders and that courts have an obligation to remedy such failures of the democratic process.

In *Shapiro*, the Court applied strict scrutiny to invalidate state laws imposing a one-year durational residency requirement for the receipt of welfare benefits, holding that the residency requirement unduly burdened the right to travel.[9] *See id.* at 638. The Court explained that the freedom to travel between the states is a fundamental right of American citizens, *see id.* at 630, and that the laws had not been shown "necessary to promote a compelling governmental interest," *id.* at 634; *see id.* at 638.

The *Shapiro* Court's decision to apply a heightened level of review served to protect the most marginalized elements of society – poor newcomers who had no had opportunity to participate politically in decisions affecting their lives – from political insiders seeking to save money by forcing newcomers to bear the burdens of budget austerity. The Court explained that "the effect of the waiting-period requirement . . . is to create two classes of needy resident families indistinguishable from each other except" for length of residence. *Id.* at 627. *Shapiro*

9. A law burdens the right to travel, and thereby triggers strict scrutiny, "when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Attorney General v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion) (internal citations and quotations omitted); *see id.* at 920-22 (O'Connor, J., dissenting).

thus demonstrates an overriding concern that poor newcomers be treated as equal citizens.[10]

The Court rejected every justification that the States offered for burdening outsiders. First, the Court rejected the argument that by deterring poor people from migrating into the States, the States would better be able to provide for their long-term residents. *See id.* at 627-28. The Court explained that "the purpose of deterring the in-migration of indigents . . . is constitutionally impermissible." *Id.* at 631. A state may not preserve resources for long-term citizens by denying benefits to otherwise similarly situated new residents. *See id.* at 627-32. The distinction could not be made even if the new residents moved solely to receive larger benefits. "[A] State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally." *Id.* at 631.

Second, the Court rejected the claim that a state may "distinguish between new and old residents on the basis" of past tax contributions. *Id.* at 637. Such reasoning

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10. Although the Court invoked the right to travel to justify the application of strict scrutiny, *Shapiro* and its progeny "clearly have less to do with constraints on migration and travel than with the unconstitutionality of distinctions between residents based on how long they have lived in the state." *Green v. Anderson*, 811 F. Supp. 516, 520 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe*, 513 U.S. 557 (1995). As one commentator has noted:

> The right to travel rationale alone, under which the waiting periods are seen as deterrents or penalties for poor people desiring to start afresh in life . . . cannot quite support these decisions; it is at least as great a deterrent to travel when the second state provides no welfare assistance at all, or offers significantly lower benefits although with no waiting period; yet the right to travel has not been read to require any minimum level of welfare benefits. A large component of these decisions must therefore be the heightened level of evenhandedness . . . which the Court has imposed on programs purporting to provide for the needy.

Laurence H. Tribe, *American Constitutional Law* § 16-48, at 1118 (1978) (footnote omitted).

> would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens.

Id. at 632-33. The Court ruled that the Equal Protection Clause does not permit states to create classes of favored citizens with exclusive entitlement to government services. *See id.*

Third, the Court rejected several administrative justifications for the one-year waiting period. *See id.* at 633-38. The States had argued, *inter alia*, that the waiting period: (1) provided an objective test of *bona fide* residency; (2) minimized the opportunity for fraud; and (3) encouraged new residents to enter the labor force. *See id.* at 633-34.[11] The Court rejected the first two justifications as impermissible efforts to save the costs associated with determining *bona fide* residency by shifting them onto new residents. Considering the third justification, the Court concluded that "[a] state purpose to encourage employment provides no rational basis for imposing a one-year waiting-period restriction on new residents only." *Id.* at 637-38.

In sum, states could neither treat indigent newcomers more harshly than long-term residents nor force indigent newcomers to bear the full costs of the states' attempts to control their budgets. Durational residency requirements constituted an "invidious discrimination" denying new citizens equal protection. *Id.* at 627. Governments that were "unwilling to ask current members of the community to make any sacrifices" could not "shift burdens onto future newcomers" who were unable to complain. Robert C. Farrell, *Classifications That Disadvantage Newcomers and the Problem of Equality*, 28 U. Rich. L. Rev. 547, 548 (1994).[12]

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11. The States had also argued that the waiting period facilitated the planning of the welfare budget. The Court held that this argument was unfounded because the States in fact relied on other methods to make budget estimates. *See Shapiro*, 394 U.S. at 634-35.

12. In contrast, the Court has been more deferential towards regulations burdening new residents where circumstances indicate that the democratic

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In a subsequent government benefits case invalidating Alaska's plan to distribute revenue from oil sales to its citizens based on length of State residency, the Court continued its close scrutiny of laws that undermine the rights of newcomers to be treated as full and equal members of the polity. *See Zobel v. Williams*, 457 U.S. 55, 61-65 (1982). Although the *Zobel* Court purported to apply rational basis review,[13] it plainly engaged in a more searching inquiry than is traditionally applied under that standard. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 459 n.4 (1985) (Marshall, J., concurring in part and dissenting in part) (describing *Zobel* as an "intermediate review decision[ ] masquerading in rational-basis language"); *Hicks v. Peters*, 10 F. Supp. 2d 1003, 1006 n.4 (N.D. Ill. 1998); Farrell, *supra*, at 561.

The *Zobel* Court's close review, like that in *Shapiro*, reflected the need to protect new residents and to eliminate the invidious distinction between outsiders and insiders. The Court stated that

> Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.

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process can be expected to treat "outsiders" fairly. Thus, in *Nordlinger v. Hahn*, 505 U.S. 1, 18 (1992), the Court upheld Proposition 13, a California law which exempted new homeowners from a cap on property tax increases. Because the plaintiff was a California resident at the time the law was adopted, the Court refused to apply strict scrutiny on the basis of the right-to-travel cases. *See id.* at 11. *Nordlinger* is thus analogous to *Barnwell Bros.*, discussed in Point I *supra*: Proposition 13 affected long-term residents and newcomers alike, and thus there was no reason to fear a breakdown of the State's democratic processes. *See Nordlinger*, 505 U.S. at 17 ("the Constitution presumes that, *absent some reason to infer antipathy*, even improvident decisions will eventually be rectified by the democratic process") (emphasis added) (internal quotations omitted).

13. The Court found it unnecessary to consider whether strict scrutiny was required, because the law failed even under the most relaxed standard of review. *See Zobel*, 457 U.S. at 60.

Zobel, 457 U.S. at 64 (footnotes omitted). The Court concluded that the plan's obvious purpose, to "favor[ ] established residents over new residents, is constitutionally unacceptable." *Id.* at 65 (internal quotations omitted). According to Justice Brennan,

> the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence. That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.

Id. at 69 (Brennan, J., concurring).[14]

In striking down two-tiered welfare benefit systems, lower federal courts have also recognized the unconstitutionality of laws that burden outsiders who had no opportunity to participate in the adoption of the legislation under challenge. For example, in previously striking down California's two-tier welfare benefits system, one district court explained that a

> State may not identify a group of current residents as its own and seek to advance their interests and address their needs to the detriment of new residents . . . [because] [s]uch a division . . . violates equal protection.

Green v. Anderson, 811 F. Supp. at 522; *see Westenfelder v. Ferguson*, 998 F. Supp. 146, 154 (D.R.I. 1998) (Rhode Island's two-tier welfare statute "sends a clear message to [newer residents] that they are unworthy of the same treatment accorded longtime residents").[15]

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14. As one commentator has argued:

> United States citizens become citizens of the states wherein they reside. There are no waiting periods. And, just as it would violate the Constitution to deny these new arrivals state citizenship, it would violate the Constitution to concede their citizenship in name only while treating them as if they were still citizens of other states. That should mean that it is unconstitutional to deny benefits to new citizens that are extended to other citizens similarly situated. . . .

William Cohen, *Discrimination Against New State Citizens: An Update*, 11 Const. Commentary 73, 79 (1994).

15. In addition, several state courts have stuck down two-tier welfare benefit systems similar to the one under consideration here. *See Mitchell v.*
(Cont'd)

Shapiro and its progeny provide the constitutional framework for considering laws that disproportionately burden outsiders. These cases demonstrate that the Court must closely scrutinize such laws to ensure that insiders have not unconstitutionally shifted their costs onto communities excluded from participation in the political process. The risk that insiders will unconstitutionally benefit themselves at the expense of outsiders is too great to do otherwise. And the heightened scrutiny applied in *Shapiro* is especially important when it is the poorest of Americans who are made to bear social costs.

B. Voting

The special care taken by this Court in reviewing durational residency requirements for voting is further evidence that the Court applies heightened scrutiny in cases that suggest a democratic failure. While all durational residency requirements burden outsiders who played no role in the adoption of the waiting period, durational residency requirements for voting cut closer to the core of the problem. These waiting periods exclude newcomers from prospective participation in the political process, causing future failures of the democratic process and cementing the dominant position of long-term residents.

In *Dunn v. Blumstein*, 405 U.S. 330, 337-38 (1972), the Court applied strict scrutiny to invalidate a durational residency requirement that denied the franchise to newcomers who were *bona fide* state residents. The Tennessee law required newcomers to reside in the State for one year and their county for three months before they could register to vote. *Id.* at 334. The Court held that the Equal Protection Clause did not countenance this treatment of new residents.[16] *Id.* at 360.

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Steffen, 504 N.W.2d 198, 202-3 (Minn. 1993) (invalidating Minnesota two-tier welfare statute); *Sanchez v. Department of Human Servs.*, 713 A.2d 1056, 1061-66 (N.J. Super. Ct. App. Div. 1998) (invalidating New Jersey two-tier welfare statute); *Brown v. Wing*, 649 N.Y.S.2d 988, 995 (Sup. Ct. 1996) (invalidating New York two-tier statute for Home Relief benefits), *aff'd*, 663 N.Y.S.2d 1025 (App. Div. 1997).

16. Applying strict scrutiny, the Court has approved 50-day durational residency requirements for voter registration. Unlike the one-year period (Cont'd)

At the heart of the *Dunn* Court's decision to closely scrutinize Tennessee's durational residency requirement was the law's denial of the primary means to political power in the State – the franchise – to an already disempowered class. By denying the franchise to newcomers, insiders could cement their control over the democratic institutions of the State, furthering the exclusion of the outsiders. As the Court noted, "the historical purpose of [Tennessee's] durational residency requirements seems to have been to deny the vote to undesirables, immigrants and outsiders with different ideas" than the State's insiders. *Id.* at 355 n.27 (internal quotations omitted).[17] Denying the franchise to outsiders was certainly the law's effect.

The Court complained that durational residency voter registration requirements "divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent of totally denying them the opportunity to vote." *Id.* at 334-35. "By denying [new] citizens the right to vote, such laws deprive them of 'a fundamental political right, . . . preservative of all rights.' " *Id.* at 336 (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)) (alteration in original). Strict scrutiny was required in order to ensure that members of the politically burdened outsider class of newly arrived citizens were afforded their "constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Id.* Whether the law was understood as a denial of the right to vote or as a penalty on the right to travel, *see id.* at 337-38, its effect was the same: the law created classes of old and new residents and excluded the latter from the political process. Such government action demands strict judicial scrutiny. *See id.* at 341-42; *see also Carrington v. Rash*, 380 U.S. 89, 93-94 (1965) (striking down Texas statute denying franchise to persons who became Texas residents while members of military because all *bona fide* residents "have a right to an equal opportunity for political representation").

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rejected in *Dunn*, the 50-day period was administratively necessary for the preparation of accurate voter lists and thus did not unnecessarily disadvantage new state citizens. *See Marston v. Lewis*, 410 U.S. 679, 681 (1973) (per curiam); *Burns v. Fortson*, 410 U.S. 686, 686-87 (1973) (per curiam).

17. The Court did not rely on this historical purpose in striking down the law. *See Dunn*, 405 U.S. at 355 n.27.

The *Dunn* Court's application of strict scrutiny further demonstrates its central concern with protecting those who have been excluded from the political process in the past from suffering from continued exclusion at present and in the future. Tennessee offered two explanations for its waiting period for voter registration, each of which the Court rejected. First, the Court rejected the State's contention that the waiting period was necessary to protect against fraud and to ensure that the ballot was limited to *bona fide* State residents, *see Dunn*, 405 U.S. at 345, on the ground that the State could achieve these goals without forcing new *bona fide* residents to sacrifice the right to vote. Just as in *Shapiro*, the Court held that states could not sacrifice the rights of outsider citizens to save insider citizens from the cost of making residency determinations.

More importantly, the Court also rejected Tennessee's second explanation: that the durational residency requirement

> [a]fford[ed] some surety that the voter has, in fact, become a member of the community and that as such, he has a common interest in all matters pertaining to its government and is, therefore, more likely to exercise his right more intelligently.

Id. at 345. The Court held that this purpose was impermissible.

> "[T]he fact that newly arrived [residents] may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of the region from which they have come, is a constitutionally impermissible reason for depriving them of their chance to influence the electoral vote of their new home state."

Id. at 355-56 (quoting *Hall v. Beals*, 396 U.S. 45, 53-54 (1969) (per curiam) (Brennan, J., dissenting)); *see Carrington*, 380 U.S. at 94 ("Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.") (internal quotations omitted). Insiders could not protect their own political power by denying the franchise to citizens who might have different opinions or social mores, or who might simply object to the insiders'

penchant for shifting fiscal burdens onto unrepresented outsiders. Thus, *Dunn* confirms the Court's intention to safeguard outsiders from failures of the democratic process caused by their exclusion from political participation.[18]

C. Health Care

In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Court was again called on to review a State statute that denied new residents access to a service that was available to other residents. Relying on the *Shapiro* and *Dunn* decisions, the Court strictly scrutinized and held unconstitutional an Arizona law requiring one year's residence in a county before an indigent was eligible to receive non-emergency medical care at county expense. *See id.* at 252-54. The statute made no distinction between transients and *bona fide* residents; only those who had lived in the county for one year qualified for care. New residents were allowed to receive emergency care for free. *See id.* at 252 & n.2.

The law at issue in *Maricopa County* forced the Court to consider whether states could favor long-term residents in the distribution of medical care, which had never been considered a fundamental right and was available to all in cases of emergency. Applying the analysis developed in *Shapiro* and *Dunn*, the Court held that the law denied new residents access to a necessity as basic as welfare benefits and thus impermissibly burdened newcomers' right to travel. *See* 415 U.S. at 259. "[T]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." *Id.* at 261. The Court's analysis, again, seems to turn on whether the

18. A state may have a stronger interest in restricting elective office to long-term residents than it does in limiting the franchise to long-term residents. It is not wholly unreasonable for a state to require some understanding of local issues and some connection with potential constituents from a person seeking to represent the interests of state residents. This factor may explain the Court's summary affirmance of New Hampshire's seven-year durational residency requirement for high state offices. *See Sununu v. Stark*, 420 U.S. 958 (1975) (mem.) (state senator), *aff'g* 383 F. Supp. 1287 (D.N.H. 1974); *Chimento v. Stark*, 414 U.S. 802 (1973) (mem.) (governor), *aff'g* 353 F. Supp. 1211 (D.N.H.).

political process has treated a newcomer, an "outsider," differently than a long-term resident, an "insider."

The Court's choice of Biblical admonition, " 'Ye shall have one manner of law, as well for the stranger, as for one of your own country,' " *id.* (citing Leviticus 24:22 (King James)), also suggests that the Court was suspicious of legislation that singled out "the stranger" who had been excluded from the political process. The people burdened by the legislation considered in *Maricopa County* were not only strangers to the political system in that they had been in the area less than one year, but they were strangers in that they were indigent and thus members of a group that often is excluded *de facto* from the political process.

The Court's analysis of whether this burden on newcomers was "legitimately defensible," *id.* at 262, also illustrates its underlying willingness to deeply scrutinize the legislative process when outsiders have been burdened and to strike such "protectionist" legislation. After brushing aside the State's asserted desire to save public money as an insufficient reason to penalize the right to travel, *see id.* at 263, the Court explicitly held that the State's avowed goal of inhibiting the immigration of indigents was constitutionally impermissible, *see id.* at 263-64. The Court also refused to give weight to the State's concern that the threat of an influx of indigents would discourage the building of good public medical facilities and that barring recent immigrants from using the programs would shore up public support for such facilities. *See id.* at 266-67. In each case, the State's asserted rationale made plain that the adoption of the durational residence requirement was motivated by exclusion and protectionism; the political will behind the law was contingent on burdening those who were not a part of the political process.

While a state's interests in maintaining the public fisc and ensuring a program's political viability are not inherently improper, *Maricopa County* shows that laws receive increased scrutiny when a state seeks to achieve those goals by burdening political outsiders. *Maricopa County* reaffirms the central lesson of *Shapiro* and *Dunn*: a state may not create a class of disfavored citizens defined by their recent migration to the state.

D. Veterans Benefits

The Court has applied heightened scrutiny – both strict scrutiny and rational basis "with a bite" – to laws giving special benefits to veterans who have lived in the state for a certain period of time. These cases involve "fixed-point" residency requirements: laws that create distinctions between residents based on non-residence at a previous point in time. The Court's scrutiny of legislative categorizing here is consistent with a suspicion of laws that favor vested interests over newer residents who have less political power.

The Court's decision in *Attorney General v. Soto-Lopez*, 476 U.S. 898, 900-01 (1986), is illustrative. There, the Court ruled that New York could not grant a civil service employment preference to its residents who were war-time military veterans and who were New York residents when they entered military service, while at the same time denying a preference to otherwise similarly situated New York residents simply because they were not New York residents when they entered the military. The Court emphasized that the law improperly "classif[ied] residents according to the time they established residence, result[ing] in the unequal distribution of rights and benefits among otherwise qualified *bona fide* residents," *id.* at 903, "favoring 'prior' residents over 'newer' ones," *id.* at 905 (plurality opinion).[19] A plurality of the Court closely examined the law to determine whether New York had indefensibly attempted to hoard State jobs for a preferred class of long-term citizens.

The plurality found that New York's fixed-point residency requirement failed strict scrutiny because each of the interests

19. Lower courts following *Soto-Lopez* have also emphasized the arbitrariness of using fixed point residency requirements to establish a resident's access to government employment. *See Grace v. City of Detroit*, 760 F. Supp. 646, 649, 651 (E.D. Mich. 1991) (applying strict scrutiny to strike rule creating durational residency requirement for city employment); *Perez v. Personnel Bd.*, 690 F. Supp. 670, 674 (N.D. Ill. 1988) ("[T]he government must justify any statute, regulation or policy that denies an individual a benefit or privilege on account of the individual's status as . . . a . . . new resident . . . [under] close[ ] [judicial] scrutiny."); *cf. Nehring v. Ariyoshi*, 443 F. Supp. 228, 237-39 (D. Haw. 1977) (pre-*Soto-Lopez* case applying strict scrutiny to strike one-year durational residency requirement for public employment).

proffered by New York in defense of the law could be furthered without discriminating between long-term and newer residents. New York argued that its rule: (1) encouraged New York residents to enlist in the armed services; (2) eased residents' transition to civilian life; (3) induced New York residents to return to New York upon leaving the service; and (4) aided in the recruitment of "a uniquely valuable class of public servants who possess useful experience acquired through their military service." *Id.* at 909. However, as the Court recognized, "each of the State's asserted interests could be promoted fully by granting bonus points to all otherwise qualified veterans." *Id.* Plainly, the fixed-point residency requirement did not simply aid veterans who were New York citizens; that aim could be achieved by providing civil service bonus points to any veteran who migrated to New York and made the State his or her home. Rather, New York was interested only in helping a certain class of citizens – well-established New Yorkers. That purpose is impermissible. *See id.* at 911 ("Once veterans establish *bona fide* residence in a State, they become the State's own and may not be discriminated against solely on the basis of the date of their arrival in the State.") (internal quotations omitted). The plurality concluded that the law was not narrowly tailored to serve a compelling interest, and therefore unconstitutionally discriminated against an already disadvantaged class of outsiders. *See id.* at 911-12; *cf. id.* at 915 (Burger, C.J., concurring) (applying rational basis review and striking law; "[T]he New York statute suffers from the same constitutional flaw as the Alaska statute in *Zobel*," because it "favor[s] established residents over new residents.") (internal quotations omitted).

Similarly, the Court in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623-24 (1985), struck down a New Mexico statute that provided tax benefits to Vietnam veterans who were New Mexico residents before May 8, 1976; veterans who moved into New Mexico after that date were not eligible for the tax benefits. The *Hooper* Court held that the New Mexico statute was "not supported by any identifiable state interest." *Id.* at 623.[20] The Court's lack of deference, even as it purported to apply a rational basis test, indicates its hostility to the statute's "creat[ion] [of] two tiers of resident Vietnam veterans,

20. As in *Zobel*, the Court deemed it unnecessary to consider whether strict scrutiny applied because the law could not pass even rational basis review. *See Hooper*, 472 U.S. at 618.

identifying resident veterans who settled in the State after May 8, 1976, as in a sense 'second-class citizens.' " *Id.* at 623.

Soto-Lopez and *Hooper* both demonstrate the Court's willingness to closely scrutinize laws benefitting veterans when those laws treat veterans with deep roots in the state differently than veterans who are more recent arrivals. Once a veteran establishes residency in the state, his or her date of entry is not a legitimate basis for differential government treatment.

E. Education

Finally, the Court's decisions in the field of education demonstrate the democratic underpinnings of the Court's "newcomer" or "outsider" jurisprudence. The laws overturned in these cases illustrate classic failures of the democratic process, where insiders try to assign a greater burden to outsiders and permanently exclude them from participation in the American democratic process.

In *Plyler v. Doe*, 457 U.S. 202, 205, 223-24, 230 (1982), the Court engaged in heightened scrutiny, while purporting to apply rational basis review, in striking down a Texas statute that withheld from local school districts any state money for the education of children whose parents were illegal immigrants. The law, which seemingly aimed to punish outsiders who had relocated within Texas, also authorized local school districts to refuse these children enrollment in school. The State argued that this exclusion was proper because the children were illegal immigrants under federal law and that it furthered the State's interest in the "preservation of the state's limited resources for the education of its lawful residents." *Id.* at 227.

The Court's analysis of Texas's interests in excluding these children was not at all deferential – it all but dropped the presumption of constitutionality and took up a searching judicial inquiry. Whereas courts applying rational scrutiny normally require that a challenged law furthers a legitimate state interest, the *Plyler* Court explained that Texas's law could not "be considered rational unless it furthers some *substantial* goal of the State." *Id.* at 224 (emphasis added). Thus, even more than the Court in *Zobel*, the *Plyler* Court explicitly engaged in rational basis review with a bite.

None of Texas's asserted interests could justify the burden imposed by the statute. The Court dismissed the State's contention that it was trying to protect itself from a flood of illegal immigrants, noting that law was a "ludicrously ineffectual attempt to stem the tide of illegal immigration." *Id.* at 228 (internal quotations omitted). The Court also brushed aside the State's asserted interest in protecting its "ability to provide high-quality public education," *id.* at 229, because the State could not show that the exclusion of undocumented children was likely to improve the quality of education provided in the State, *see id.* Finally, the Court rejected, as utterly without basis, the State's claim that undocumented children were less likely than others to remain in the State after the completion of their education and make a positive contribution to the life of Texas. *See id.* at 229-30. The Court concluded: "It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries. . . ." *Id.*

The Court applied heightened scrutiny after explicitly reiterating its earlier holdings that education is not a fundamental right and that illegal aliens are not a suspect class under equal protection analysis. *See id.* at 219-21 & n.19. The Court's searching review recognized the civic function of education and the importance of public schools in training children to become full participants in the community. "We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Id.* at 221.[21] The Court

21. By contrast, the Court's review is deferential when *bona fide* residency requirements are at issue. *See Martinez v. Bynum*, 461 U.S. 321, 326-29, 332 (1983) (upholding Texas law creating presumption that children living in school district with someone other than parents were not *bona fide* residents, but allowing such children to challenge presumption and establish residency); *see also Vlandis v. Kline*, 412 U.S. 441, 453 (1973) (striking Connecticut law creating an irrebuttable presumption of non-residency for tuition purposes, but approving state's interest in preserving "right of its own *bona fide* residents to attend [public universities] on a preferential tuition basis"); *Starns v. Malkerson*, 401 U.S. 985 (1971) (mem.), *aff'g* 326 F. Supp. 234 (D. Minn. 1970) (upholding one-year durational residency requirement for in-state tuition).

The Court's decision in *Sosna v. Iowa*, 419 U.S. 393 (1975), also reflected (Cont'd)

refused to defer to the legislature because the law not only placed a disproportionate burden on outsiders but threatened to ossify their status as a permanent underclass. *See id.* at 219 ("The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.").

Thus, in considering the constitutionality of durational residency requirements under the Equal Protection Clause, the Court has revealed its disapproval of state laws that create two classes of citizens – newcomers who are excluded from the full benefits of state citizenship and long-term residents who are given preferential treatment. Section 11450.03 is such a law, because it discriminates against newcomers who, by definition, were denied any opportunity to participate in the process that led to its adoption. Worse, it singles out poor newcomers, a class that is often singularly unable to defend its rights in the political sphere. The Court is obligated to apply strict scrutiny to invalidate section 11450.03 in order to remedy this failure of the democratic process.

III.

CONGRESSIONAL ACTION CANNOT SAVE CALIFORNIA'S DURATIONAL RESIDENCY REQUIREMENT BECAUSE CONGRESS MAY NOT AUTHORIZE LOCAL MAJORITIES TO VIOLATE THE EQUAL PROTECTION CLAUSE.

The unconstitutionality of California's discrimination against poor newcomers cannot be avoided by appeal to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. §§ 601, *et seq.* (1998), because Congress may not delegate to entrenched state majorities the standardless discretion to force poor newcomers to live as second-class citizens. *E.g.*, *Shapiro*, 394 U.S. at 641. The relevant political majority in

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a concern for *bona fide* residency. In *Sosna*, the Court upheld Iowa's requirement that a plaintiff reside in the State for one year before filing a divorce action. *See id.* at 396. The requisite connection to the State served Iowa's interest in avoiding interference in matrimonial matters of primary importance to other states, and in preventing collateral attacks to the divorce decrees of its own courts. *See id.* at 406-08.

such circumstances is not the national majority (which has simply decided not to decide), but state decision-makers who actually determine whether to impose discriminatory hardships on poor newcomers.[22] Heightened scrutiny under the Equal Protection Clause is required precisely because newcomers are absent from the state decision-making fora where these decisions are, in fact, made. Were Congress to possess the power to release state majorities from the constraints imposed by the Equal Protection Clause, crucial protections for state minorities would be at the mercy of a decision-making process that never calls upon a national majority to confront its actual exercise.

Not surprisingly, this Court has firmly rejected the argument that Congress may authorize the states to enact a caste system for newcomers. In *Shapiro*, this Court directly rejected the argument that a federal law, which directed the Secretary of Health, Education and Welfare "not to disapprove [state welfare] plans submitted by the States because they include[d]" waiting periods for receipt of benefits, *id.* at 639, insulated state durational residency requirements from constitutional attack. Instead, the Court held that "Congress may not authorize the States to violate the Equal Protection Clause." *Id.* at 641; *see Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) ("We emphasize that Congress' power under § 5 [of the Fourteenth Amendment] is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732-33 (1982). Congress's adoption of the PRWORA thus cannot save section 11450.03 from unconstitutionality.[23]

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22. The closest analogy is to the non-delegation doctrine. Congress's decision to grant standardless discretion to a decision-maker does not automatically vest the decision-maker with majoritarian legitimacy. *See, e.g., Loving v. United States*, 517 U.S. 748, 758-59 (1996); *Weiss v. United States*, 510 U.S. 163, 189 n.5 (1994) (Souter, J., concurring); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672-76 (1980) (Rehnquist, J., concurring in the judgment); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-42 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 420-30 (1935); *cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122, 125 (1982) (limiting ability of state government to delegate authority).

23. Congress's inability to validate state action that violates the Equal Protection Clause contrasts with its power to authorize state action that would otherwise violate the dormant Commerce Clause. *See supra* note 8.

Moreover, where, as here, critically important rights of national citizenship are at stake, Congress may not delegate to local majorities the power to dilute those rights. One of the most important privileges and immunities of national citizenship is the ability to migrate from one state to another in search of work. *See Zobel*, 457 U.S. at 76-77 (O'Connor, J., concurring). Congress may not authorize states to deprive newcomers of this essential right of national citizenship.

Finally, viewed from the perspective of national citizenship, no group is more vulnerable nor less likely to form enduring ties with the political majority than those who are forced to exercise their right to interstate travel in order to escape from poverty and secure a better life elsewhere. While such persons are not a suspect class for Equal Protection purposes, *see Harris v. McRae*, 448 U.S. 297, 323 (1980), their precarious status does cast doubt on the validity of a Congressional judgment to consign their fate to local majorities that have strong economic incentives to deter their migration.[24]

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24. Of course, were Congress to mandate that the states enact two-tier durational residency requirements, such a provision would burden the right to travel and should be invalidated pursuant to strict judicial scrutiny. *See Shapiro*, 394 U.S. at 641-42.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to strictly scrutinize California's one-year durational residency requirement for full welfare benefits and affirm the decision below preliminarily enjoining section 11450.03.

Respectfully submitted,

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